

Delaware Attorney General Beau Biden Prepared Remarks

MERS Deceptive Trade Practices Lawsuit – Oct. 27, 2012

Since at least the 1600s real property rights have been a cornerstone of our society.

Our real property system has relied for centuries on clarity, reliability and public access. These three needs have been met for centuries by the Recorder of Deeds offices in counties and municipalities across this country. That's why the Recorder of Deeds Offices exist.

In that system, a citizen in Delaware could walk from their farm or home and go to their elected County Recorder of Deeds and expect transparency and access to land records. That citizen could see and feel the title to their land and see if anyone held a lien against it. That is why they exist.

In 1995, with no public discussion, our system changed drastically when a consortium of banks, government service entities like Fannie Mae and Freddie Mac, and other players in the mortgage industry decided to privatize the public recordation system for their own benefit. They did so with little regard for the rest of us. The private system they created is called MERS – the Mortgage Electronic Registration System.

MERS, a private, obscure mortgage registry, benefited its members – and not homeowners – in two key ways.

First, it allows its member to avoid paying millions of dollars in county recording fees in Delaware and across the country. Second, MERS fueled the mortgage-backed securities market by facilitating the slicing and dicing of mortgages, a practice that helped bring our economy to the brink of collapse.

Today, approximately 30 percent of mortgages in Delaware and 60 percent nationwide are held in the name of MERS.

MERS is unreliable, inaccurate and opaque, and violates Delaware's Deceptive Trade Practices in three key ways:

- 1) MERS, through its private mortgage registry, knowingly obscures important information from borrowers and the information that MERS does provide to borrowers is frequently inaccurate. The opacity of MERS' mortgage registration database makes it difficult for consumers to know of or challenge inaccuracies in the MERS System. This harmed borrowers when MERS foreclosed on borrowers in its own name, thus impairing a borrower's ability to raise defenses. This also frustrates the ability of borrowers to seek out the owner of their loan to pursue loan modifications or other loss mitigation relief.
- 2) MERS often acts as an agent without authority from its proper principal. Because the MERS System was both unreliable and frequently inaccurate, MERS often does not know the identity of its proper principal. Where the name of the owner of the mortgage loan recorded in the MERS System does not reflect the true owner, any action MERS takes on behalf of the purported owner is without authority.
- 3) MERS is effectively a "front" organization that has created a systemically important mortgage registry but fails to properly oversee that registry or enforce its own rules on the members that participate in the registry. Rather than maintaining an adequate staff to provide MERS' services, MERS operates through a network of over 20,000 deputized non-employee corporate officers who cause MERS to act without any meaningful oversight from anyone who works at MERS. This has resulted in MERS recording so-called "robosigned" documents with county recorders of deeds, as well as MERS' failure to follow its own rules regarding proper institution of foreclosure proceedings.

Our complaint cites an example of a recent foreclosure in New Castle County in which MERS forecloses on a loan in which it had no interest and without naming the real party in interest.

In fact, the entity upon whose behalf MERS sought to foreclose had actually been dissolved months prior. Moreover, MERS' own records indicated numerous transfers in and out of MERS that were not reflected in the county records, as required by MERS' own rules.

The confusing path and inaccurate records associated with this mortgage are not an isolated instance of bad record keeping by MERS. Rather, this type of confusion is endemic to the entire MERS System.

Our complaint lists numerous ways MERS violated our Deceptive Trade Practices Act, including:

- Hiding the true mortgage owner and removing that information from the public land records.
- Creating a critically important, yet repeatedly unreliable, mortgage database that created confusion and inappropriate assignments and foreclosures of mortgages.
- Operating MERS through its members' employees, who MERS confusingly appoints as its corporate officers so that such employees may act on MERS' behalf.

MERS' deceptive trade practices have left our time-tested public land recording system in shambles, and the privatization of property records has clouded the titles of homes all over the country.

We brought this action in the Court of Chancery, the premier business court in the country, because we are seeking reforms of the MERS system to ensure transparency and liability.

Among the reforms our suit seeks are:

- Requiring MERS to audit its records to ensure accuracy
- Stopping MERS from foreclosing on homes without divulging the true owner of the mortgage
- Ordering MERS to correct records filed with county Recorder of Deeds that do not list the entity that owns the mortgage

- Imposing a civil penalty of up to \$10,000 for each willful violation of the Deceptive Trade Practices Act, as well as restitution to borrowers who were harmed by these violations

Because MERS is a private recording system, it must provide the same transparent, accurate public information that is found in our county recording systems.

MERS has raised serious questions about who owns what in America. A man or woman's home is not just his or her's largest investment, it is their castle. Keeping track of who owns what has been a central role of government since governments were formed. In an era when the role of government is being debated, there can be no doubt that this remains an important – and essential – role of government.

Rules matter. A homeowner has the obligation to pay the mortgage on time, and lenders must follow the rules if they are seeking to take away someone's house through foreclosure. A bank must be able to clearly prove its interest in the property without dispute. The honor system won't work.

Thank you.